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IN THE

Supreme Court of the United States

October Term, 1945

No. 489

EDWARD F. ZAP,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

REPLY BRIEF.

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The Government concedes, as it must, that the affidavits for the search warrants, upon which the alleged search of Zap's premises were based, were invalid. The Government has stated "and at the close of their investigation, obtained a search warrant for petitioners' books and records on the basis of an affidavit, which we concede to be technically deficient in that it failed to set forth grounds for believing that petitioner had committed an offense. (Resp. Br. 12.)

The only basis for the seizure was the affidavit and the search warrant, and it was upon this basis that the trial court ruled.

The Government further concedes that there never was any search warrant nor was there any listing for the check of $4,000.00, which was Government's Exhibit 7, and formed the principal basis for appellant's conviction.

But the Government misstates in its brief "However, the F. B. I. agents were acting under the auspices and by the authority of the Navy Department." (Resp. Br. 13.) There is nothing in the record to show that the Navy Department ever gave any authority to make any inspection or that Congress ever gave any authority to seize where it designated only inspection.

The only authority which the F. B. I. claimed was that of a senior accountant, a senior cost inspector of the Navy. This is contrary to the provisions of Title 13 of the Second War Powers Act, 50 U. S. Code, Section 643, which only authorizes the Secretary of the Navy to grant authority or permission to make inspections to persons within his own branch of the Government. Here there is no authority shown by the Secretary of the Navy to anyone, much less the F. B. I., to inspect these books or records, or to take them.

The Government's brief raises the important point of whether F. B. I. Agents had authority to make any inspections where their only claimed authority was from a senior accountant, a senior cost inspector of the Navy (working in a clerical position) and where no such authority was ever granted or allowed by the Secretary of the Navy. The very statement seems to contain its own answer—that no such jurisdiction existed. To permit any civilian clerk working for one of the departments of the Government who has authority to inspect books to delegate that authority to someone not authorized would go far beyond the congressional purposes and open up the Government's storehouse of confidential information through clerks and attaches, which obviously was never intended by Congress.

The Government's position raises an important question for this Court to decide as to whether the right of inspec-

tion includes the right of search and seizure and whether a subordinate may delegate his individual right of inspection to a department not specifically authorized by the executive order.

This Court has held that the power of subpoena may not be delegated where not specifically authorized by Congress.

Cudahy Packing Co. v. Holland, 315 U. S. 357.

The respondent furthermore confuses the right of inspection by a department specifically authorized to audit them for its own purposes with the right of search and seizure by another department for prosecution, without search warrant. The respondent's brief misstates the fact when it says that the F. B. I. Agents were acting under the auspices and by the authority of the Navy Department, since the evidence in this case does not disclose that the Navy Department granted such authority. Such authority would have to come from the Secretary of the Navy or someone duly authorized by him to grant such authority, even if it were permissible and there was no evidence in the record to show that the Secretary of the Navy or anyone authorized by him gave such authority to the F. B. I. in this case. The fact that the petitioner's bookkeeper cooperated with the agents of the F. B. I. did not waive his constitutional rights.

Amos v. U. S., 65 L. Ed. 654.

A similar case was seen in *Gouled v. U. S.*, 65 L. Ed. 647.

The Government further admits that Government's Exhibit 7, the $4,000.00 check, is not specifically mentioned in any return of the search warrants (page 10). Nor was it ever specifically described in any search warrants.

The $4000 check was not a "claim" as charged in Count IV.

The Government says that if inspection had been resisted, the Government would have been required to resort to a court order to obtain the documents, but the affidavit of the petitioner's bookkeeper establishes that she cooperated with the agents. But no employee has a right to "cooperate with the agents" of the F. B. I. in a search and seizure without the consent of the owner.

Amos v. United States, 65 L. Ed. 145;
Gouled v. United States, 65 L. Ed. 647;
U. S. v. Lefkowitz, 285 U. S. 452.

The Government has not touched on our question of the sufficiency of the evidence for a directed verdict as to lack of guilty knowledge on the part of the defendant. It has also tried to justify what it concedes to be possibly an incorrect instruction and an incorrect definition of the word "willful" with the fact that the court gave other instructions which it claims were correct. But the giving of a bad instruction is not cured by the giving of correct instructions.

We believe the other matters have been sufficiently covered in our opening brief and in our petition, for which reason we respectfully request that certiorari be granted.

Respectfully submitted,

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